IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 514 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No

2. To be referred to the Reporter or not? No

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3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

SNEHAL BROTHERS

Versus

J.K.SYNTHETICS CO.LTD.

Appearance:

MR PV NANAVATI for Petitioners

MR MB FAROOQUI for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision: 07/05/97

ORAL JUDGEMENT

1. This is a revisional application under Section 115 C.P.C. by the defendants against the order passed by the learned judge of City Civil Court setting aside an ex parte decree passed against them on their depositing in court a sum of Rs.1,50,000/= within the time prescribed by the order. The petitioners who are original defendants have been sued by the respondent for price of goods supplied to the petitioners. The suit was filed as a Summary Suit under Rule 142 of Ahmedabad City Civil

Courts Rules,1961 to recover a sum of Rs.28,16,156=28 with interest and cost. On service of

the summons of the suit, the petitioners entered an appearance through learned pleader Shri B.A.Surti. The respondent thereafter, served on the petitioners a summons for judgment in prescribed form on April 11, 1991. Thereupon the matter was posted for hearing on May 2, 1991. It is the case of the petitioners that they had determined the appointment of learned pleader Shri Surti and appointed learned Advocate Mr.S.J.Desai to act on their behalf. However, on May 2, 1991, learned pleader Shri B.A.Surti as well as learned counsel Shri S.J.Desai submitted seperate applications before the court seeking adjournment in the matter to enable the petitioners to submit application seeking leave to defend the suit. In view of the request made by the learned advocates, the suit was adjourned to May 5, 1991. On that day, learned advocate Shri S.J.Desai submitted an application and prayed the court to adjourn the matter to enable the petitioners to file application seeking leave to defend the suit. The court therefore, adjourned the matter on September 26, 1991. On September 26, 1991, the suit was listed for hearing on the board and the name of learned advocate Mr. B.A.Surti was notified as advocate appearing on behalf of the petitioners. Neither Shri Surti nor Shri S.J.Desai nor the petitioners remained present in the court on September 26, 1991. Under the circumstances, hearing of summons for judgment took place and the court passed the decree against the petitioners.

2. On June 4, 1992, the petitioners submitted an application under Order 37 Rule 4 C.P.C. and prayed the court to set aside ex parte decree. The respondent resisted the application by filing reply at Exh.18. It was inter alia claimed that no special circumstances were made out for setting aside the ex parte decree, and, therefore, the application was liable to be dismissed.

3. The learned Judge of the City Civil Court found that the appointment of learned pleader Mr. B.A.Surti had not been determined with the leave of the court by a writing signed by the petitioners or the pleader nor learned counsel Mr. S.J.Desai had filed his appearance, and, therefore, no error was committed by Registry in mentioning name of learned advocate Mr. B.A.Surti as advocate appearing for the petitioners. However, the learned Judge noticed that the learned advocate appearing for the respondent knew well that authority conferred upon learned pleader Mr. Surti, to act, plead and appear was withdrawn and Mr.S.J.Desai learned Advocate was

appointed by the petitioners to act on their behalf, but that fact was not brought to the notice of the court when summons for judgment was taken up for hearing. Under the circumstances, the learned Judge concluded that special circumstances were made out by the petitioners for setting aside the ex parte decree. In view of this conclusion, the learned Judge set aside ex parte decree by order dated March 6, 1997, passed below Exh.1 in Civil Misc. Application No.392/92. While setting aside the ex parte decree dated September 26, 1991, rendered in Summary Suit No.393/91, the learned Judge has directed the petitioners to deposit a sum of Rs.1,50,000/= and

file application for leave to defend the suit within the time prescribed in the order. The direction to the petitioners to deposit a sum of Rs.1,50,000/= in court has given rise to the present revision.

4. Mr.P.V.Nanavati, learned counsel for the petitioners submitted that while setting aside ex parte decree and directing the petitioners to deposit a sum of Rs.1,50,000/= in the court, the learned Judge should have granted leave to the petitioners to defend the suit and as leave to defend the suit is not granted, the revision should be accepted and leave to defend the suit should be granted to the petitioners. It was pleaded that the direction to the petitioners to deposit a sum of Rs.1,50,000/= in the court is onerous as well as uncalled for, and, therefore, the said direction deserves to be set aside. In support of his submissions, learned counsel placed reliance on the decisions rendered in the cases of (1) The New Ashapuri Co-operative Housing Society Pvt.Ltd. and another v. Arvindkumar Manilal Patel, 16 G.L.R.53 and (2) Bank of India v. M/s. Mehta Brothers and others V1991 (2) Current Civil Cases, 68 .

5. Mr. A.H. Mehta, learned counsel for the respondent submitted that decree is not passed against the petitioners after refusing leave to defend the suit, and, therefore, the learned Judge was justified in not giving leave to defend the suit to the petitioners. It was highlighted that conduct of the petitioners indicated that they were only bidding for time and as direction given to the petitioners is justified by the facts of the case, the impugned order should not be interfered with in the present revision. It was pleaded that the learned Judge has not exercised discretion under Order 37 Rule 4 of CPC arbitrarily and therefore revision application should be dismissed.

6. In view of rival submissions advanced at the bar,

it would be necessary to interpret the term " may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do" appearing in Rule 4 of Order XXXVII C.P.C. Since impugned order is passed by the learned Judge, City Civil Court,Ahmedabad, it would be necessary to refer to scheme envisaged by Rules 142 to 148-A of the Ahmedabad City Civil Courts Rules, 1961. Rule 4 of Order XXXVII is a part of an integral scheme provided by Rules 142 to 148-A of the Ahmedabad City Civil Courts Rules, 1961. Therefore, it cannot be considered or construed in isolation. In order to determine the true meaning of the relevant term appearing in Rule 4 of Order XXXVII C.P.C. the context of setting, scheme, purpose and principles of Chapter XI of Ahmedabad City Civil Courts Rules, 1961, will have to be taken into consideration. An isolated consideration of Order XXXVII Rule 4 would lead to the risk of some other interrelated provisions becoming otiose or devoid of meaning. Interpretation must depend on the text and context as they are bases of interpretation. While the words of enactment are important, the context is no less important. The fact that general words are used in a statute is not in itself a conclusive reason why every case falling literally within them should be governed by that statute and the context of an Act may well indicate that wide or general words should be given a restrictive meaning. All general words are open to inspection. Many general words demand inspection, to see whether they really bear their widest possible meaning. Having regard to these settled principles of interpretation of statute, it would be advantageous to notice in brief the scheme relating to summary suits as provided in Chapter XI of the Ahmedabad City Civil Courts Rules, 1961. So far as city of Ahmedabad is concerned, the State Government has established Ahmedabad City Civil Court under Ahmedabad City Courts Act, 1961. The High Court of Gujarat in exercise of powers under Article 227 of the Constitution and Section 122 of C.P.C., 1908, has with approval of the Governor and the Government of Gujarat, made rules known as Ahmedabad City Civil Courts Rules 1961. Chapter XI of the said Rules containing Rules 142 to 148-A deals with summary suits. Rule 142 of the Rules provides that all suits upon bills of exchange, hundis or promissory notes and other suits enumerated therein can be instituted as a " summary suit " by presenting a plaint. The plaint has to contain an averment that the plaintiff is suing under the Summary Procedure under Order XXXVII of the Code of Civil Procedure. The writ of summons in suit instituted has to be in form No.5. The plaintiff has to, together with writ of summons, serve on the defendant a copy of

the plaint and exhibits thereto. The defendant has to enter an appearance within 10 days of service of summons either in person or by an advocate. On the day of entering appearance, notice of the appearance has got to be given to the plaintiff's advocate or to the plaintiff himself if he sues in person. The defendant is not entitled to defend the suit unless he enters an appearance and obtains leave from a Judge to defend the suit. In default of his entering an appearance and of his obtaining such leave to defend, the allegations in the plaint not only should be deemed to be admitted, but the plaintiff is entitled to a decree for the sum mentioned in the summons, together with interest at the rate specified (if any) up to the date of decree and such sum for costs. If the defendant enters an appearance or files a Vakilatnama, the plaintiff is entitled to apply by a summons for judgment returnable not less than 10 clear days from the date of service, to the Sitting Judge in chamber for the amount claimed together with interest (if any) and costs. A summons for judgment should be in form No.6 of the Forms annexed to the Rules. The summons for judgment must be supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit. The defendant, if he desires to defend the suit has to file an affidavit or declaration disclosing the grounds and facts on which he seeks leave to defend the suit. A copy of such affidavit or declaration must be supplied by the defendant to the plaintiff or his advocate who may file an affidavit or declaration in rejoinder. The leave to defend has to be granted or refused having regard to the factors indicated in Rule 143 (1) (c) of Ahmedabad City Civil Courts Rules, 1961. If the defendant fails to file an affidavit or declaration as contemplated by Rule 143 (1) (b) or if the defendant fails to make out sufficient grounds or discloses facts sufficient to entitle him to defend the suit the Judge has to pass a decree in favour of the plaintiff. As noticed earlier, a defendant may be granted leave to defend the suit conditionally or unconditionally. If the defendant does not comply with the condition imposed by the court, the plaintiff is entitled to apply to put the suit down for hearing forthwith and the court may pass a decree against the defendant. This, in short, is the Scheme envisaged by Rules 142 to 148-A of Ahmedabad City Civil Courts Rules, 1961, relating to summary suits.

To a limited extent, Rules 142 to 148-A of the Ahmedabad City Civil Courts Rules, 1961, are inconsistent with the amended Rules of Order XXXVII C.P.C. as found

in case of Keshavlal v. Manubhai (1968) 9 G.L.R.,177. So far as courts other than the courts established under Ahmedabad City Courts Act, 1961, are concerned, provisions of Order XXXVII C.P.C. would apply to classes of suits enumerated in sub rule (2) of Rule 1 of the said Order. The plaintiff is entitled to institute a summary suit by presenting a plaint, if the provisions of Order XXXVII applies to his case. The plaint has to contain particulars which are specified in Rule 2 (1) of Order XXXVII C.P.C. The summons of the suit has to be in form No.4 as specified in Appendix B to C.P.C. The defendant is not entitled to defend the suit unless he enters an appearance and in default of his entering an appearance, not only the allegations in the plaint must be deemed to be admitted, but the plaintiff is entitled to a decree for the sum mentioned in the summons, together with interest at the rates specified, up to the date of decree and such sum for costs. In a suit to which Order XXXVII applies, the defendant has to enter an appearance either in person or by pleader within 10 days of service of summons. On the day of entering the appearance, notice of such appearance is required to be given by the defendant to the plaintiff or his pleader. If the defendant enters an appearance, the plaintiff is entitled to serve on the defendant a summons for judgment in the prescribed form returnable not less than 10 days from the date of service. The summons for judgment must be supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit. The defendant, within 10 days from the service of such summons for judgment has to disclose on oath or otherwise, such facts as may be deemed sufficient to entitle him to defend the suit and has to apply on such summons for leave to defend the suit. The leave to defend has to be granted or refused having regard to the factors indicated in sub rule (5) of Rule 3 of Order XXXVII. If the defendant has not applied for leave to defend or if such application has been made and is refused, then the plaintiff is entitled to judgment forthwith at the hearing of summons for judgment. In view of the provisions of Rule 148-A of the Ahmedabad City Civil Courts Act, 1961,it is evident that Rules in Chapter XI are in supersession of Rules 2 and 3 of Order XXXVII C.P.C. as amended by the High Court of Bombay under Section 122 of C.P.C., but Rules 4 to 7 of Order XXXVII of C.P.C. are applicable to summary suits which may be instituted under Chapter XI of the said Rules. The scheme envisaged under Chapter XI of Ahmedabad City Civil Court Rules, 1961, as well as scheme contemplated by Order XXXVII C.P.C. makes it abundantly clear that the Court can pass a decree against the

defendant in the following circumstances. (1) When the defendant fails to enter the appearance within 10 days from the date of service of summons or within the time which may be extended by the court (2) When the defendant does not apply for leave to defend the suit (3) When the defendant fails to comply with the condition imposed by the court while granting leave to defend the suit and (4) When application submitted by the defendant seeking leave to defend the suit is rejected by the court.

7. Rule 4 of Order 37 confers power on the court to set aside decree passed in any of the eventualities mentioned above and reads as under :

> Order XXXVII Rule 4 Power to set aside decreeAfter decree the Court may, under special circumstances set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.

A bare reading of Order XXXVII Rule 4 makes it apparent that the provisions of said Rule are applicable to any decree which may be passed by the court under Rule 1 to Rule 3 of the said Order or Rules 142 to 147 of Ahmedabad City Civil Couts Rules, 1961. Therefore, it would not be correct to say that irrespective of nature of decree and the stage at which it might have been passed, the court must, in all cases, grant leave to the defendant to defend the suit, while setting aside the decree. The kind of leave to be granted to the defendant by the court while setting aside decree under Order XXXVII Rule 4 would differ from facts to facts and cannot be put in straight-jacket formula. When the decree is passed against the defendant on the ground that he failed to enter the appearance, the court may, at the time of setting aside decree, give him leave to appear to the summons. Similarly when decree is passed against the defendant on the ground that he failed to apply for leave to defend the suit, the court may while setting aside decree, grant leave to him to appear to the summons for judgment. However, when the decree is passed against the defendant on the ground that he failed to comply with condition imposed by court while granting leave to defend the suit, the question of granting leave to the defendant to appear to the summons would not arise, but the question of restoring leave to the defendant to defend the suit on certain conditions may arise for consideration of the court. Again when decree is passed

against the defendant after rejection of application seeking leave to defend the suit, the court may grant leave to defend the suit, to the defendant, while setting aside decree. As noticed earlier, the defendant has to apply for leave to defend the suit on service of summons for judgment and if he makes necessary application, the court has to consider the question whether conditional or unconditional leave to defend the suit should be granted or not. Therefore, when the Court passes decree against the defendant on the ground that the defendant has not applied for leave to defend, the Court at the best can give leave to the defendant to appear to the summons for judgment while setting aside ex parte decree, but question of granting leave to defend the suit does not arise at that stage. Having regard to the scheme of Order XXXVII the word " and " appearing in the term " may give leave to the defendant to appear to the summons and to defend the suit " will have to be read as "or" to give effect to the legislative intent. The word "or" is normally disjunctive and " and " is normally conjunctive, but at times they are read as vice versa to give effect to the manifest intention of the legislature as disclosed from the context. If the interpretation as suggested by learned counsel for the petitioners is accepted, it will stultify the scheme of Order XXXVII as well as Chapter XI of Ahmedabad City Civil Courts Rules,1961 and would make other interrelated provisions otiose or devoid of meaning. Literal construction canvassed by learned counsel for the petitioners is bound to defeat the manifest object and purpose of Order XXXVII C.P.C. The term " if it seems reasonable to the court so to do" immediately following the term " may give leave to the defendant to appear to the summons and to defend the suit " appearing in Rule 4 of Order XXXVII also makes it clear that the kind of leave which may be granted to the defendant by the Court while setting aside decree would vary from facts to facts, and, therefore, it would be reasonable to read the word " and " appearing in term " may give leave to the defendant to appear to the summons and to defend the suit" as "or" to give effect to the manifest intent purpose and object of Order XXXVII. If the relevant term appearing in Rule 4 of Order XXXVII is interpreted to mean that the Court should not only give leave to the defendant to appear to the summons, but also must give leave to the defendant to defend the suit while setting aside decree it is bound to defeat the scheme of Order XXXVII and Chapter XI of Ahmedabad City Civil Courts Rules,1961. Under the circumstances, I do not find any substance in the contention of Mr. P.V.Nanavati, learned counsel for the petitioners that the learned Judge has committed an error in not granting

leave to the petitioners to defend the suit while setting aside ex parte decree. The said contention has no merits and is hereby rejected.

8. The next question which arises for consideration of the court is whether direction to the petitioners to deposit a sum of Rs.1,50,000/= in the court is onerous and unreasonable so as to call for interference of the court in the revision application which is instituted under Section 115 of CPC ? Mr. P.V.Nanavati, learned counsel for the petitioners submitted that the learned Judge in paragraph 10 of the impugned order has held that the petitioners were not at fault, but concerned advocates appearing for the petitioners were not vigilant enough in keeping watch over proceedings and in view of this finding, the petitioners should

saddled with liability to deposit a sum of Rs.1,50,000/= in the court. What was highlighted on behalf of the petitioners was that the condition requiring the petitioners to deposit a sum of Rs.1,50,000/= in the court is not only onerous but unreasonable, and, therefore, should be set aside. From the facts which are narrated above, there is no manner of doubt that the petitioners had engaged learned pleader Mr. B.A.Surti to defend the suit. It is their case that thereafter, authority of learned pleader Mr. Surti to act on their behalf was determined and learned counsel Mr. S.J.Desai was engaged to act on their behalf.However, the record of the case does not indicate at all that appointment of learned pleader Mr. Surti was determined with the leave of the Court by a writing signed by the petitioners or the pleader as contemplated by Order III Rule 4 (2) CPC or learned counsel Mr. S.J.Desai had filed his appearance on behalf of the petitioners. Therefore, for all practical purposes appointment of learned pleader Shri Surti to act, plead and appear on behalf of the petitioners must be deemed to be in force as provided by Order 111 Rule 4(2) C.P.C. and Registry of City Civil Court did not commit any error in showing appearance of Mr. Surti as representing the petitioners.It was the duty of the petitioners to see that appearance was filed by learned counsel Shri S.J.Desai on their behalf and that authority given to learned pleader Shri B.A.Surti to appear in the case was properly determined. The record of the case unerringly shows that on May 2, 1991, one application was submitted by learned pleader Mr. B.A.Surti and another application was submitted by learned counsel Shri S.J.Desai praying for time in the matter to enable the petitioners to file application seeking leave to defend the suit. The averments made in application for setting aside ex parte decree shows that

on May 5, 1991, an application was submitted by learned counsel Shri S.J.Desai and prayer was made to adjourn the matter to enable the petitioners to file application for leave to defend the suit. The prayer for adjournment was granted by the court, and, thereafter, the matter was adjourned to September 26, 1991. Thus, it can well be presumed that to the knowledge of learned counsel Shri S.J.Desai, the matter was adjourned to September 26, 1991 for hearing of summons for judgment. The averments made in the application for setting aside decree further indicate that on September 15, 1991, application seeking leave to defend the suit was already prepared. Therefore, on September 26, 1991, the petitioners were supposed to remain present in the court for filing/submitting application for leave to defend. However, neither the petitioners nor their advocates remained present in the court on September 26, 1991, and, therefore, at the hearing of summons for judgment, the court passed decree in favour of the respondent. Even after passing of decree, none of the petitioners tried to contact lawyer Shri S.J.Desai for a pretty long time. The case pleaded in the application that the petitioners learnt about the decree having been passed from a friend does not inspire any confidence. It is rightly pleaded by the respondent that the petitioners learnt about the decree having been passed by the court only when it was sought to be executed by the respondent. The application for setting aside ex parte decree is filed on June 4, 1992,. Thus, for a period of about 8 months, the petitioners did not care to make inquiry as to whether application for leave to defend the suit which was already prepared on September 15, 1991, was in fact submitted before the court or not or what was the progress of the suit. On totality of the facts and circumstances of the case, I am of the view that even if it is assumed that the learned advocate appearing for the petitioners was negligent, that fact by itself would not absolve the petitioners from their liability because the petitioners if not more were equally negligent. The law, as it stands today is that the negligence of the lawyer cannot be treated as negligence of client. However, in this case, the petitioners were also equally negligent, and, therefore, the decision rendered in the case of Bank of India (Supra) is not applicable to the facts of the present case. In the said case, after service of summons, the defendants had engaged advocate, but no appearance in the court was entered at all by the advocate. The facts of the said case indicate that no responsible person in the firm of lawyer was looking after case of the defendants and it was left to be followed by the Court Clerk. Under the circumstances,

while considering the question of setting aside the ex parte decree under the provisions of Order IX Rule 13 read with Section 151 CPC, the court has held that a party cannot be saddled with liability for negligence of his lawyer. Here in this case, though learned counsel Mr. S.J.Desai had not filed appearance on behalf of the petitioners, he in fact had appeared in the suit and applied for adjournment on two occasions to enable the petitioners to file application for leave to defend the suit. Apart from that, the conduct of the petitioners indicates that to a large extent they were negligent in attending the court proceedings. Therefore, the principle laid down in the case of Bank of India (Supra) is not applicable to the facts of the present case and is of no avail to the petitioners. Similarly in the case of New Ashapuri Co-operative Housing Society Ltd. and another (Supra) the Division Bench has considered the question of revisional powers under Section 115 of the Code of Civil Procedure while considering the question whether leave to defend the case should be granted conditionally or unconditionally. This decision is not of much assistance to Mr. Nanavati learned counsel for the petitioners because in the present case I am dealing with order passed under Order XXXVII Rule 4 of CPC and not an order passed under Order XXXVII Rule 3 of CPC. The petitioners have neither pleaded in the application for setting aside ex parte decree nor in the memorandum of present revision application that because of their weak financial condition they are not in a position to deposit Rs.1,50,000/= in the Court. It may be mentioned that ex parte decree for a sum of Rs.28,16,156=28 together with interest and cost was passed by the court on September 26, 1991 and the court was considering the question of setting aside the same in the month of March 1997. Under the circumstances, direction requiring the petitioners to deposit Rs.1,50,000/= cannot be termed as onerous or unreasonable so as to call for interference of the court in the present revision application which is filed under Section 115 of the Code of Civil Procedure. It is relevant to notice that though the court has called upon the petitioners to deposit a sum of Rs.1,50,,000/= in the court, no direction is given by the court to pay any amount therefrom to the respondent. On what terms the ex parte decree should have been set aside itself is a matter within the discretion to be exercised by the learned Trial Judge judicially and this court would be very slow to interfere in revision with such discretionary orders. In the case of Girdharilal Mahadulal Agravwal v. Shah Nagji Acholdas, a firm A.I.R. 1956, Bombay, 256 the opponents had sued the petitioner for price of goods supplied by the opponents. The suit

was filed as a Summary Suit under Order XXXVII CPC. The petitioner was called upon to deposit Rs.9,000/- in order to enable him to put his defence. The deposit was not made by the petitioner, with the result that an ex parte decree was passed. Thereafter, the petitioner took out a notice of motion for setting aside ex parte decree. The learned Judge of City Civil Court while setting aside ex parte decree directed the petitioners to deposit in court a sum of Rs.14,800/= within the time prescribed by the order. The said order was challenged by the petitioner by way of filing revision under Section 115 of the Code. While dismissing the application, the court has held as under :

> "In the present case, when the order under revision came to be passed, the learned trial judge was absolutely right in putting the petitioner on term so as to protect the respondent in respect of the amount which had already been decreed in their favour. Therefore, in my opinion, there is no substance in the grievance made by Mr. Joshi in the present revisional application.
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> Besides, on what terms, the ex parte decree should have been set aside itself is a matter within the discretion of the learned trial Judge and this court would be very slow to interfere with the revision with such discretionary orders."

9. In view of the principle laid down by the binding decision of the Bombay High Court in the abovereferred to case, I am of the opinion that the direction requiring the petitioners to deposit Rs.1,50,000/= in court while granting leave to appear to the summons is neither onerous nor unreasonable in any manner and therefore not liable to be interfered with in the present revision application.

10. In order to draw analogy I may refer to decision rendered in the case of Ramesh Chand and another, v. Punjab National Bank and others, A.I.R. 1990 SC, 1147 In that case, decree was passed against the appellants as they had failed to file written statement. It was found that the conduct of the appellants was far from satisfactory and it appeared that they had tried to delay the matter. However, while giving final opportunity to the appellants for filing written statement, the Supreme Court directed the appellants to deposit a sum of Rs.2,00,000/ When direction to deposit a sum of

Rs.2,00,000/= can be imposed while permitting the defendants to file written statement, I am of the view that direction requiring the petitioners to deposit a sum of Rs.1,50,000/= in the court while setting aside ex parte decree for an amount of Rs.28,16,156=28 with interest and cost cannot be said to be unreasonable or arbitrary at all. In fact, it is usual for the courts to impose such condition while setting aside decree. The facts of present case also show that the conduct of the petitioners is far from satisfactory and they have delayed hearing of summons for judgment. The learned Judge has held that special circumstances are made by the petitioners for setting aside ex parte decree as learned advocate appearing for the respondent had not brought to the notice of the court that Mr. S.J.Desai, learned advocate was representing the petitioners. It is well settled that the court should try to adjudicate claims of the parties on merits and therefore, such a lenient view of the matter is taken by the learned Judge. However, no jurisdictional error is committed by the learned Judge while rendering impugned order, and, therefore, the revision application cannot be accepted.

11. The Supreme Court in the case of Managing Director (MIG) Hindustan Aeronautics Ltd. Balanagar, Huderabad v. Ajit Prasad Tarway A.I.R. 1973, SC, 76 has held as under.

> "In our opinion the High Court had no jurisdiction to interfere with the order of the first appellate court. It is not the conclusion of the High Court that the first appellate court had no jurisdiction to make the order that it made. The order of the first appellate court may be right or wrong ; may be in accordance with law; but one thing is clear that it had jurisdiction to make that order. It is not the case that the first appellate court exercised its jurisdiction either illegally or with material irregularity. That being so, the High Court could not have invoked its jurisdiction under S.115 of the Civil Procedure Code : See the decisions of this Court in Pandurang Dhoni v. Maruti Hari Jadhav, (1966) 1 SCR 102= (AIR 1966 SC 153). and D.L.F.Housing & Construction Co. (P.) Ltd, New Delhi v. Sarup Singh, (1970) 2 SCR 368 = (AIR 1971 SC 2324). "

Again in the case of Municipal Corporation of Delhi v. Suresh Chandra Jaipuria and another, A.I.R. 1976 SC, 2621, it is held by the Apex Court that finding of facts

recorded by fact finding court cannot be interfered with by the High Court while exercising powers under Section 115 of the Code. In view of the settled legal position, I am of the opinion that no case is made out by the petitioners for interfering with the impugned order and the revision application is liable to be dismissed.

12. For the foregoing reasons, the revision application fails and is dismissed. Time to deposit Rs.1,50,000/= is hereby extended upto July 7, 1997. The trial court is directed to notify the suit for hearing of summons for judgment on July 21, 1997. The hearing of summons for judgment as well as of the application which may be filed by the petitioners seeking leave to defend the suit shall be disposed of by the learned Judge as early as possible and preferably on or before August 31, 1997. The application seeking leave to defend the suit which may be submitted by the petitioners shall be decided by the court on merits and in accordance with law without being influenced by the impugned order or by the order which is passed by the High Court in the present Revision Application. It is clarified that the deposit which may be made by the petitioners shall be without prejudice to their rights and subject to the result of the suit. The trial court is directed to invest the sum which may be deposited by the petitioners in Fixed Deposit with any nationalised bank initially for a period of 3 years. Subject to foregoing modifications in the impugned order, rule is discharged with no order as to costs.

R & P be sent tothe trial court forthwith.

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